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January 23

Honorable Lane Dwinall  
Governor of New Hampshire  
Concord, New Hampshire

Dear Governor Dwinall:

You have inquired concerning the relationship between the Governor and Council in respect to responsibility for the conduct of meetings, manner of voting, and power to negative. This memorandum seeks perhaps too briefly to summarize these questions.

A. Negative.

The power to negative a vote of the Council derives from the Constitution, Part Second, Article 47, which specifically states that "The Governor and Council shall have a negative upon each other, both in the nominations and appointments. Every nomination and appointment shall be signed by the Governor and Council, and every negative shall be also signed by the Governor or Council who made the same." When Article 47 speaks of "the nominations and appointments" it is referring exclusively to those set forth in the immediately preceding Article, namely Article 46, which is confined by express terms to "judicial officers, the attorney general, coroners, and all officers . . . of the militia". In no other cases, unless by specific provision of statute, does the Governor have a "negative" on the Council or the Council a "negative" on the Governor.

B. Statutory Special Situations.

In a very substantial number of situations, the appointment of certain officials in the state government is specifically provided for, in some instances by the Governor with the advice and consent of the Council; with the advice of the Council; with the approval of the Council; and with the consent of the Council. These special situations all involved the same relationship.

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In all of them it is the Governor's appointment. The Council may not appoint. Unless the Governor appoints there is no appointment but once the Governor has appointed it is necessary to have the approval of a majority of the Council present and voting, assuming always a quorum to be present. In the appointment of such officers, other than constitutional officers, the Governor acts independently of the Council, and the Council independent of the Governor. Opinion of the Justices, 98 N.H. 530, 532.

In those situations where the appointment is stated as being by the Governor and Council, or where the appointment must be approved by the Governor and Council, such appointment or approval may be that of the Governor and Council as a single body depending on the intent of the particular statute. See 98 N.H. 530. In such a case it would require a majority of the six individual voters or a majority of those present and voting, a quorum being present, to make the appointment or pass the approval.

In those situations where the appointment or pardon is by the Governor with the advice of the Council or with the approval of the Council, etc., the capacity to initiate action is by statute vested solely in the Governor with the limitation that the action cannot become effective unless it is approved or consented to by a majority of the Council present and voting, a quorum being present.

In some circumstances the statutory language is so phrased as to amount in substance to the equivalent of "the Governor shall appoint . . . with the advice and approval of the council . . ." Such language, in my opinion, does not require advice or approval prior to the act of suggesting the appointment. Under such a statute the sole prerogative to appoint is vested in the Governor but the appointment cannot become effective until the Council approves. The Governor is not required to consult with the Council before making an appointment as a matter of law.

C. Responsibility for Conduct of Meeting.

The powers of the Governor and Council are provided for in RSA, chapter 4. Nothing therein specifies the manner in which the Governor and Council shall meet or what rules shall govern its hearings or other proceedings. Much depends on prior custom and usage unless the Governor and Council should vote to establish rules and regulations for the conduct of business. Even were such a step to be taken, clearly rules and regulations of one Governor and Council would not bind a subsequent Governor and Council unless shown to have been adopted by the successors. Thus it is impossible to specify applicable existing rule or regulation governing the conduct of meetings of the Governor and Council without knowledge of prior custom and usage in specific factual situations. However, generally speaking, the rules of parliamentary procedure would apply unless specifically rejected and Roberts Rules of Order are as good a reference for the resolution of difficulties as I know of for such

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purposes. It perhaps is worthy of note that at any particular meeting, there being no binding regulations nor applicable rules, a motion might be made for a variance in procedure, and such a motion, if carried by a majority of those present and voting, would govern the conduct of the meeting.

I understand generally that the Governor and Council now require the submission of certain matters for their consideration a specified number of days prior to a given meeting but whether this is a formal regulation or a rule adopted at a meeting governing all subsequent meetings of the present Governor and Council, I do not know.

The Constitution (Part II, Article 62) provides that ". . . the Governor shall have full power and authority to convene the council, from time to time, at his discretion; and, with them, or the majority of them, may and shall, from time to time hold a council, for ordering and directing the affairs of the state. . ." In my opinion in the absence of the Governor or a person constitutionally acting Governor within the provisions for successorship due to absence or illness, no binding action can be taken at a Council meeting.

Respectfully,

Louis C. Wyman  
Attorney General

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